

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 26, 2006

**TIMOTHY E. HIGGS v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Morgan County  
No. 9028 E. Eugene Eblen, Judge**

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**No. E2005-02712-CCA-R3-HC - Filed December 14, 2006**

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The petitioner, Timothy E. Higgs, appeals from the criminal court's denial of his petition for writ of habeas corpus. On appeal, he essentially argues that his sentence of ten years as a persistent offender is illegal because the state did not timely file a notice to seek an enhanced punishment, and he did not have the requisite number of prior convictions to qualify as a persistent offender. Following our review of the parties' briefs and applicable law, we affirm the criminal court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

James W. Brooks, Jr., Wartburg, Tennessee, for the appellant, Timothy E. Higgs.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Scott McCluen, District Attorney General; and Frank Harvey and John H. Bledsoe, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

The petitioner was convicted of possession of contraband in a penal institution, a Class C felony and was sentenced to ten years as a Range III, persistent offender. On appeal, the judgment was affirmed. *See State v. Timothy E. Higgs*, No. W1999-01534-CCA-R3-CD, 2000 WL 1024553 (Tenn. Crim. App., at Jackson, July 24, 2000) *perm. app. denied* (Tenn. Mar. 12, 2001). On January 30, 2004, the petitioner filed a petition for writ of habeas corpus challenging *inter alia* his classification as a persistent offender. Following a brief hearing on the matter, the criminal court denied the petitioner's petition for writ of habeas corpus. The petitioner now appeals.

In Tennessee, "[a]ny person imprisoned or restrained of his liberty, under any pretense whatsoever, except [those held under federal authority], may prosecute a writ of habeas corpus to

inquire into the cause of such imprisonment and restraint.” *Church v. State*, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998); *see also* Tenn. Code Ann. § 29-21-101 *et seq.* However, the grounds upon which a writ of habeas corpus may be issued are very narrow. *McLaney v. Bell*, 59 S.W.3d 90, 92 (Tenn. 2001). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the petitioner or that the petitioner is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the judgment to establish its invalidity. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). The burden is on the petitioner to establish, by a preponderance of the evidence, “that the sentence is void or that the confinement is illegal.” *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. *See Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

On appeal, the petitioner first argues that his ten-year-sentence as a persistent offender is illegal because the state did not timely file a notice to seek an enhanced punishment. The petitioner also argues that his sentence is illegal because he did not have the requisite number of prior convictions to qualify as a persistent offender. Specifically, the petitioner argues that the court misapplied the “twenty-four-hour rule” set forth in Tennessee Code Annotated section 40-35-107(b)(4) when counting his prior felony convictions.

The petitioner is not entitled to habeas corpus relief. First, the record clearly reflects that the state properly filed notice of its intent to seek enhanced sentencing more than ten days before trial in compliance with Tennessee Code Annotated section 40-35-202(a). The record indicates that the state filed its notice on May 10, 1999, and the defendant was tried and convicted on June 24, 1999. Moreover, this court has previously found that a failure to file a notice of enhanced punishment does not render a sentence void or illegal. *See James C. Johnson v. Tony Parker, Warden*, No. W2005-01570-CCA-R3-HC, 2006 WL 1168830, at \*3 (Tenn. Crim. App., at Jackson, May 2, 2006), *perm. app. denied* (Tenn. 2006); *Gary Wayne Calhoun v. Howard W. Carlton, Warden*, No. E2005-00001-CCA-R3-HC, 2006 WL 433680, at \*3 (Tenn. Crim. App., at Knoxville, Feb. 23, 2006); *Milburn L. Edwards v. State*, No. M2004-01378-CCA-R3-HC, 2005 WL 544714, at \*2 (Tenn. Crim. App., at Nashville, Mar. 7, 2005), *perm. app. denied* (Tenn. 2005). Therefore, even if taken as true, this claim does not entitle the petitioner to habeas corpus relief.

Second, we discern no error in the court’s classification of the petitioner as a Range III, persistent offender. Tennessee Code Annotated section 40-35-107(b)(4) states that with the exception to convictions where bodily injury is involved, convictions for multiple felonies committed as part of a single course of conduct within a twenty-four-hour period constitute one conviction for the purpose of determining prior convictions. *Id.* (2003). According to the state’s

notice of sentence enhancement, the petitioner had seven prior felony convictions. Pursuant to the “twenty-four-hour rule,” two of the petitioner’s burglary and two of the petitioner’s theft convictions merged having occurred on the same day. *See State v. David Anthony Lee*, No. E1999-02537-CCA-R3-CD, 2000 WL 1478570, at \*2 (Tenn. Crim. App., at Knoxville, Oct. 6, 2000) (“The date of adjudication or the entry of judgment is irrelevant when applying the twenty-four hour merger rule.”). However, even after the merger of those convictions, the petitioner still qualified as a persistent offender having five felony convictions. *See* Tenn. Code Ann. § 40-35-107(a)(1). Moreover, any errors in offender classification not directly contravening an express statutory provision would merely render the resulting judgments voidable, not void. *McConnell v. State*, 12 S.W.3d 795, 798 (Tenn. 2000); *see Jubal Carson v. David Mills, Warden*, No. W2005-00745-CCA-R3-HC, 2006 WL 16306, at \*5 (Tenn. Crim. App., at Jackson, Jan. 4, 2006). As such, this issue is not subject to collateral attack via petition for writ of habeas corpus. In sum, there is nothing which appears on the face of the judgment or the record of the proceedings which indicates that the petitioner’s sentence is illegal or void.

Based on the foregoing and the record as a whole, we affirm the judgment of the criminal court.

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J.C. McLIN, JUDGE